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In The

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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INTEREST OF *AMICUS CURIAE*

The Michigan Manufacturers Association ("MMA") is a business association composed of more than 3,000 Michigan businesses. An important aspect of MMA's activities is representing the interests of its member-companies in matters of paramount importance before state and federal courts, the United States Congress, the Michigan legislature, and state agencies.[1] MMA appears before this Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan.

Resolution of the issues presented by this case will have profound and far-reaching implications for MMA's members and for the economy of the State of Michigan. Michigan's employment base has suffered substantial erosion in the past decade, particularly in the manufacturing sector. Many manufacturing jobs formerly performed within the state have disappeared overseas, and are unlikely to return. Michigan and its neighbor states of the Sixth Circuit are in the midst of an intense struggle to maintain the manufacturing base that has provided the life blood of the region's economy for generations.

The decision of the United States Court of Appeals for the Sixth Circuit[2] below threatens to deprive these states of an important tool in that struggle – the use of tax incentives to encourage capital investments that create jobs for their citizens. Unfortunately, that decision was procured by a group of litigants whose financial interest in the outcome of this case is essentially nil. Because that

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[1] No person or entity, other than MMA and its members, made a monetary contribution to the preparation or submission of this brief.

[2] *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004).

lack of financial interest also connotes lack of standing to seek the relief the panel below granted, this case should be remanded to the court below for dismissal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The presence of this case on this Court's docket represents the culmination of a lengthy crusade on the part of plaintiffs' counsel, Professor Peter Enrich, to remake the tax policy of the states, using the Commerce Clause as his tool. Almost a decade ago, Professor Enrich published a detailed argument[3] that tax incentives offered by the states to attract business were "contrary to their citizens' interests."[4] His mission was nothing less than to, in his words, use the Commerce Clause to "protect the states themselves against competitive exercises of their sovereignty."[5] With the help of consumer activist Ralph Nader, Professor Enrich assembled a group of plaintiffs and brought this case.[6]

While vaulting his theory from the printed page to this courtroom undoubtedly represents a personal and professional triumph for Professor Enrich, the process by which this occurred presents troubling jurisprudential issues. This Court's purpose is not to provide peer review of academic papers, but rather to resolve flesh-and-blood

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[3] Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

[4] *Id.* at 380.

[5] *Id.* at 381.

[6] Enrich, *Breaking the Incentive Cycle: A Role for the Courts*, Corporation for Enterprise Development Accountability Newsletter, Volume 1, Number 9, September 1999.

controversies. In the present case, the controversy is arguably real enough, but it does not involve these plaintiffs to any justiciable degree. Because the plaintiffs lack standing to place before this Court the issue that forms the basis of this case, the case should be remanded to the court below for dismissal.

ARGUMENT

THE PLAINTIFFS IN THIS CASE HAVE SUFFERED NO COGNIZABLE INJURY THAT IS REDRESSED BY THE DECISION BELOW

A. Plaintiffs' Standing Is Based Only on Plaintiffs' Status as Ohio Taxpayers.

As noted, this case is in essence the actualization of a legal theory put forth in a law review article. Historically, this Court has declined to render decisions on the basis of interesting legal theories, but rather has required that the parties that bring a case to this Court have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of questions which the court so largely depends for illumination of difficult constitutional issues," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). This requirement of standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). This Court has summarized the elements of the standing requirement as follows:

"A plaintiff must allege personal injury [the injury element] fairly traceable to the defendant's allegedly unlawful conduct [the causation element] and likely to be redressed by the requested relief [the redressibility element]," *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), these requirements were spelled out in more detail:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." 504 U.S. at 560 (citations and footnote omitted).

None of the plaintiffs in this case can demonstrate all three of these elements to a degree quantifiably sufficient to claim standing before this Court.

Every bit of information there is to know about these plaintiffs and their alleged justification for bringing this case can be found in the following eight paragraphs of the Complaint for Declaratory and Injunctive Relief they filed in the Lucas County, Ohio, Common Pleas Court:

> 2. Plaintiffs Charlotte I. Cuno, Mary L. Branwen, Judith A. Pfaff, Kenneth P. Pfaff, Robert Scott Brundage, Herbert H. Raschke,

Carol A. Raschke, Duane M. Arquette, Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek and Rick Van Landingham are all residents of the City of Toledo, Lucas County, Ohio and as such are property owners and/or renters and pay property, sales and/or income taxes to the City of Toledo, Lucas County and the State of Ohio. Plaintiffs Mary Ebright, Helen Czapczynski, and Jean E. Kaczmarek all formerly resided within the development zone of DaimlerChrysler, Inc.'s Jeep plant project which is described further herein, and all three of said Plaintiffs were displaced from the homes they owned and/or resided in as a result of the use, or threatened use, of the eminent domain power by the City of Toledo to obtain title to their land in order to convey it to DaimlerChrysler Corporation for the Jeep plant project.

3. Plaintiffs Kathleen Hawkins and Carrie Hawkins (the "Michigan Plaintiffs") are residents of the State of Michigan, and they pay various taxes to the State of Michigan. Plaintiff Kathleen Hawkins owns residential real property in Michigan and pays property taxes thereon.

4. Plaintiff Phoenix Earth Food Co-op, Inc. is a not-for-profit corporation under the laws of the State of Ohio the purpose of which is to operate a food sales cooperative in the City of Toledo. The Co-op pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

5. Plaintiff Hutton Pharmacy, Inc. is a for-profit corporation under the laws of the State of Ohio which operates a drug store and pharmacy business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

6. Plaintiff Kim's Auto and Truck Service, Inc. is a for-profit corporation under the laws of the State of Ohio which operates an automotive mechanical repair business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio. Said Plaintiff's business is, as of the time of filing of this Complaint, located within the boundaries of the Jeep plant project. This Plaintiff's real estate is currently facing the invocation, or threatened invocation, of the power of eminent domain by the City of Toledo in order for the land on which it is located at 3708 Stickney Avenue, Toledo to be conveyed to Defendant DaimlerChrysler, Inc. as part of the Jeep plant project. The Plaintiffs enumerated in ¶¶ 2, 4, 5 and 6 herein are collectively referred to as the "Ohio Plaintiffs."

* * *

22. The Ohio Plaintiffs are injured by this scheme in that the subsidy has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and City of Toledo, to which the Ohio Plaintiffs contribute through their tax payments. The tax exemption to DaimlerChrysler thereby diminishes the funds available to these governmental bodies for lawful uses and shifts to the Ohio Plaintiffs a disproportionate burden of supporting these governmental functions.

23. One Ohio Plaintiff, Kim's Auto and Truck Service, Inc., is a small business whose real property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep

plant project. Without the aforesaid tax exemption, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

24. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to locate its facilities in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the facilities had instead been located in Michigan, such location would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the state of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs are directly injured by Toledo's subsidies to DaimlerChrysler.

While the Complaint alludes vaguely to a "subsidy" or "tax subsidy package," the issue for decision by this Court is the narrow one of whether a particular provision of the Ohio Revised Code, § 5733.33, violates the Commerce Clause. More specifically, the question is whether a credit against the Ohio franchise tax, the availability of which is conditioned on investment in property to be placed in service in Ohio, discriminates against interstate commerce.

What basis do any of these plaintiffs have to challenge this statute? Citation to authority is hardly necessary to dispense with the "Michigan Plaintiffs." Their claim is that they would have benefited from "economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan" had DaimlerChrysler located its plant in Michigan "which, upon information and belief," was a likely alternative site.[7] A more indirect, speculative, and dubious connection to Ohio's franchise tax can hardly be imagined. This Court has consistently held that standing does not exist where a litigant is unable to demonstrate more than "that he suffers in some indefinite way in common with people generally," *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). Here, the Michigan Plaintiffs suffer no more from the operation of the Ohio franchise tax credit than the citizens of every other state where the DaimlerChrysler Jeep plant is *not* located.

Standing is likewise absent in the case of the Ohio resident individuals and the one business, Kim's Auto and Truck Service, who allegedly have been or are threatened to be "displaced" by the City of Toledo's exercise of the power of eminent domain in support of the physical expansion of the DaimlerChrysler facility. This Court has recently had occasion to explore the boundaries of permissible public uses for which the taking power may be

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[7] This allegation is doubly ironic, first, because the Complaint studiously avoids mentioning the possibility that the "Ohio Plaintiffs" might likewise enjoy these "economic opportunities" as a result of placement of this facility in Toledo, and second, because the State of Michigan, arguably the real party in interest for purposes of the claims of the "Michigan Plaintiffs," has actively joined in the effort to overturn the decision below.

exercised, and in doing so has interpreted that power broadly.[8] Regardless, the connection between Ohio's taxing power and Toledo's taking power is far too tenuous to bear the weight of this Commerce Clause challenge. As noted in *Lujan*, *supra*, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court" 504 U.S. at 560 (citations and internal punctuation omitted). The City of Toledo is technically "before the court," but not to answer for its exercise of the power of eminent domain.

B. Taxpayer Standing Is Not Available in the Absence of Expenditure of Funds.

What is left, then, are the claims of the "Ohio Plaintiffs" in their capacities as taxpayers, but even then the nature of those claims is not altogether clear. It is alleged, for example, that some Ohio Plaintiffs pay property taxes, and that "the tax exemption to DaimlerChrysler . . . has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and the City of Toledo." This allegation may implicate the property tax exemption aspect of this case, which this Court has chosen not to review, but it has nothing to do with the investment tax credit against the Ohio franchise tax.

Indeed, it is not evident from the pleadings that any plaintiff even pays the franchise tax to which the investment credit applies. But if one or more of them does, there

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[8] *Kelo, et al. v. City of New London*, ___ U.S. ___, 125 S. Ct. 24 (2005).

is (and can be) no claim that those plaintiffs are discriminated against by the investment tax credit. The central claim in this case is that the credit discriminates against out-of-state interests. By definition, this claim automatically excludes any possible claim of damage to any of the Ohio Plaintiffs, and indeed no such claim of damage is made.

Reading the allegations of the Complaint as generously as possible, its thesis is that the investment tax credit actually discriminates against someone other than the Ohio Plaintiffs *but*, by granting the discriminatory credit, the State of Ohio damages the Ohio Plaintiffs by transferring to them some unspecified additional element of the financial support of the state. Even under this reading, however, these plaintiffs satisfy neither the injury nor the causation element of the standing requirement.

In the context of lawsuits brought by taxpayers, the injury and causation elements of the standing requirement have uniformly taken the form of a challenge to a governmental expenditure – what this Court has described as "a good-faith pocket-book action," *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). There is no such expenditure in the present case. The State of Ohio has not spent so much as a nickel derived from any of the Ohio Plaintiffs in granting the tax credit in question. What it has done is to *refrain* from collecting a tax from someone else. But that act of grace to another cannot, consistent with this Court's holding in *Doremus*, and its subsequent holding in *United States v. Richardson*, 418 U.S. 166 (1974), form the basis for a claim by a taxpayer *qua* taxpayer. What this Court said in *Richardson* applies equally here:

> While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. 418 U.S. at 177.

Absent a challenge to the exercise of the State of Ohio's spending power, the Ohio Plaintiffs as taxpayers lack standing to challenge the constitutionality of this tax statute.

C. "Tax Expenditure" Theory Does Not Supply Standing.

Respondents might argue in opposition to the foregoing that there is no difference in substance between an actual expenditure of tax funds of the type this Court has required for standing and a "tax expenditure" – the amount of funds theoretically "spent" by government when it declines to exercise its taxing power in a specific circumstance, e.g., by exempting charitable organizations from the income tax. This argument cannot succeed, however, in light of this Court's holding in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

Camps Newfound involved a Commerce Clause challenge to a Maine statute that provided a property tax exemption for "benevolent and charitable institutions incorporated" within the state, but which was subject to certain limitations for institutions "in fact conducted or operated principally for the benefit of persons who are not residents of Maine." The Maine Supreme Judicial Court had upheld the constitutionality of the statute, "noting

that a Maine statute characterized tax exemptions as 'tax expenditures.'"

On appeal, this Court declined to equate tax exemptions with tax expenditures for Commerce Clause purposes, saying:

> Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions.
>
> * * *
>
> Assuming, *arguendo*, that the Town is correct that a direct subsidy benefiting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends. 520 U.S. at 589.

The importance of this holding for purposes of standing (as opposed to for purposes of the Commerce Clause itself) is that these plaintiffs cannot substitute an alleged "tax expenditure" for an actual outlay of money by the state in order to meet the minimum requirements of standing imposed by *Doremus* and *Richardson*.[9]

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[9] Conversely, if this Court chooses to abandon its holding in *Camps Newfound* and equate a tax exemption with a subsidy for standing purposes, the underlying Commerce Clause dispute necessarily disappears because, as this Court noted in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994), "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." Indeed, one commentator has suggested that the difficulty in drawing a principled distinction between tax exemptions and subsidies should prompt this Court to leave the field of dormant Commerce Clause jurisprudence entirely. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant*

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D. The Ohio Plaintiffs Likewise Fail the Redressibility Test.

Even if one were to grant credibility to the dubious "tax expenditure" rationale, a ruling that the Ohio investment tax credit discriminates impermissibly against interstate commerce places the plaintiffs in no better position than before. If the credit is struck down, there can be no assurance that tax revenues will increase as a result, or that DaimlerChrysler or any other taxpayer will engage in business activities in Ohio at the same level, or at all. What Justice Kennedy said in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), therefore resonates here:

> [I]t is pure speculation whether [this] lawsuit would result in any tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but since education in Arizona is not financed solely from the school trust fund . . . , the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain . . . " 490 U.S. at 614.[10]

Commerce Clause Prohibition on Discriminatory Taxation, 29 Ohio N.U.L. Rev. 29 (2002).

[10] In *ASARCO*, this Court held, without citation to authority, that the plaintiffs there had standing, notwithstanding that there was "no basis on which to find that [they] would satisfy the requirements of federal standing articulated by our precedents," because the case had come up through the Arizona state court system and it was "the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit." 490 U.S. 616-17, 618. In other words, the injury in fact in *ASARCO* was to the defendants-petitioners, and arose as a result of the

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It is unclear what the Plaintiffs in this case actually want for themselves, beyond vindication of the legal theory of their counsel, but to the extent it involves any financial interest whatever, the possibility of recovery of that interest by this lawsuit is likewise "remote, fluctuating, and uncertain."

CONCLUSION

It is evident that these plaintiffs entirely lack the personal financial stake in the outcome of this case that this Court has traditionally demanded of litigants appearing before it. The relief sought and obtained from the panel below confers no discernible benefit on them while harming all of the Defendants as well as the citizens of Ohio. What the plaintiffs have done, ultimately, is to instigate a controversy in which they have no constitutionally significant involvement. This is an inherently suspect route into this Court:

> When . . . , as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed [to establish standing.] [W]hen the plaintiff is not himself the object of the government action or inaction he

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state court's ruling on federal law. In the present case, litigation was commenced in the state court, but removed immediately to federal court. In these circumstances, the Court has no need to defer to a state court's "authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on [its] own interpretations of federal law." 490 U.S. at 617. Thus, nothing in *ASARCO* prevents this Court from remanding the present case to the court below for dismissal.

> challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish,"

Lujan v. Defenders of Wildlife, supra, at 562.

This Court should not be deterred from ordering dismissal of this case by the fact that these plaintiffs may be the only parties who can or will bring this action. What this Court said in *United States v. Richardson, supra*, is instructive in this regard:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system

> provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them. 418 U.S. at 179 (emphasis in original).

In *Doremus*, this Court observed: "It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury, but is a religious difference." 342 U.S. at 434. Likewise, the present case involves not a dollars-and-cents injury but a tax policy difference. Those, like Respondents and their counsel, who disagree with Ohio's tax policy (which is the tax policy of most other states as well) are free to address those issues at the ballot box. They do not, however, have standing to assert that disagreement here.

Respectfully submitted,

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